Ku Izham bin Ku Adnan v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — CRIMINAL REVISION NO 43–16 OF 1997
ABDUL MALIK ISHAK J
4 FEBRUARY 1998

Criminal Procedure *— Plea of guilty — Revision — Allegation that accused was unrepresented and therefore, did not understand the nature and consequences of his plea — Charge read and explained to the accused twice — Accused pleaded guilty on both occasions — Whether accused understood the nature and consequences of his plea — Criminal Procedure Code (FMS Cap 6) s 173(a)*

Criminal Procedure *— Revision — Revisionary power of High Court — Power to correct miscarriage of justice — Judge has duty to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order — Whether such power of revision discretionary — Criminal Procedure Code (FMS Cap 6) s 325*

The accused had exhibited a firearm during a robbery and was charged under s 4 of the Firearms (Increased Penalties) Act 1971 which carried a sentence of imprisonment for life and whipping with not less than six strokes. When the accused was produced before the sessions court in Johor Bahru , the charge was read and explained to him and he understood that charge. The sessions judge then recorded in her notes of evidence that the accused had pleaded guilty and understood the nature and consequences of his plea. When the sessions court resumed after a short adjournment, the judge again read and explained the same charge to the accused. The accused repeated that he understood the charge and the judge again recorded that the accused pleaded guilty to the charge and understood the nature and consequences of his plea. The sessions court judge subsequently convicted the accused and sentenced him to life imprisonment and 10 strokes of whipping.

The accused appealed against the 10 strokes of whipping that the sessions court judge imposed on him, leaving intact the sentence of life imprisonment. However, two letters from the Johor Bahru prison gave the accused the impression that the accused would be released from prison on 20 July 2010. The makers of the two letters were mistaken and had since affirmed affidavits to that effect. As such, the appeal was subsequently withdrawn by the accused. The accused's counsel applied for this revision on the ground that at the time the accused entered his plea, he was unrepresented and therefore, did not understand the nature and consequences of his plea.

Held, confirming the sentence of life imprisonment but reducing the number of strokes of whipping from 10 to six:

(1) The object of a revision is to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted in some injury to the

due maintenance of law and order or in some undeserved hardship to individuals. The judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. However, the powers of revision under s 325 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') are entirely discretionary (see pp 723H–I and 724B–C, E–F); *Emperor v Nasrullah & Ors* AIR 1928 All 287 and *Liaw Kwai Wah & Anor v PP* [1987] 2 MLJ 69 followed.

(2) It is mandatory under s 173(a) of the CPC that the charge should be read and explained to the accused before the accused is asked whether he pleads guilty of the offence charged or claims to be tried. An accused person should also plead guilty or claim trial by his own mouth and not through his counsel or advocate. Here, the sessions court judge had complied fully with the strict requirements of s 173(a) and (b) of the CPC. The charge was read and explained to the accused and the accused had understood the nature and consequences of his plea (see pp 726H and 727C–D, G).

(3) The court should not use affidavits in revision proceedings. The notes of evidence should be sufficient for a judge to decide the fate of the accused. However, s 424(1) of the CPC enacts that any affidavit may be used in a criminal court. This court acting in its revisionary capacity is also a criminal court. Further, the affidavits in this case had been vouched by the persons concerned to be correct in the context of s 424 of the CPC (see pp 727H–I and 728G); *PP v Audrey Keong Mei Cheng* [1997] 3 MLJ 477 followed.

[Bahasa Malaysia summary

Tertuduh telah mengekshibitkan senjata api ketika suatu rompakan dan dipertuduhkan di bawah s 4 Akta Senjata (Penalti Lebih Berat) 1971 yang membawa hukuman pemenjaraan seumur hidup dan disebat dengan tidak kurang daripada enam sebatan rotan. Ketika tertuduh dikemukakan di mahkamah sesyen di Johor Bahru, tuduhan telah dibaca dan diterangkan kepadanya dan dia memahami tuduhan itu. Hakim sesyen kemudiannya mencatatkan dalam nota-nota keterangan beliau bahawa tertuduh telah mengaku salah dan memahami sifat serta akibat akuannya. Apabila mahkamah sesyen bersidang semula selepas penangguhan yang singkat, hakim sekali lagi telah membaca dan menjelaskan pertuduhan yang sama kepada tertuduh. Tertuduh mengulangi bahawa dia memahami pertuduhan itu dan hakim sekali lagi mencatatkan bahawa tertuduh telah mengaku salah kepada pertuduhan dan memahami akan sifat serta akibat akuannya itu. Hakim mahkamah sesyen kemudiannya telah mensabitkan tertuduh dan menjatuhkan hukuman pemenjaraan seumur hidup dan disebat 10 kali.

Tertuduh merayu terhadap 10 sebatan yang dikenakan atasnya oleh hakim mahkamah sesyen, dan mengekalkan hukuman

pemenjaraan seumur hidup. Walau bagaimanapun, dua pucuk surat daripada penjara Johor Bahru telah memberikan tanggapan kepada tertuduh bahawa dia akan dilepaskan daripada penjara pada 20 Julai 2010. Pembuat kedua-dua surat telah tersilap dan sejak itu telah mengikrarkan afidavit mengenainya. Oleh yang demikian, rayuan tersebut telah kemudiannya ditarik balik oleh tertuduh. Peguam tertuduh memohon penyemakan ini atas alasan bahawa ketika tertuduh memasukkan akuannya, dia tidak diwakili dan maka, tidak memahami sifat dan akibat akuannya.

Diputuskan, mengesahkan hukuman pemenjaraan seumur hidup tetapi mengurangkan bilangan sebatan daripada 10 kepada enam:

(1) Objek sesuatu penyemakan adalah untuk mengurniakan bidang kuasa yang bersifat kebapaan atau penyeliaan kepada mahkamah jenayah, agar dapat memperbetulkan salah laksana keadilan yang berbangkit daripada salah konsep undang-undang, ketidakaturan prosedur, pengabaian pencegahan yang wajar atau kekasaran layanan yang nyata, yang telah mengakibatkan kecederaan kepada pengekalan wajar undang-undang dan ketenteraman atau dalam sebilangan keadaan membangkitkan kesulitan yang tidak sepatutnya kepada individu. Kewajipan hakim adalah untuk memuaskan mengenai ketepatan, kesahan atau kesuaian sebarang keputusan, hukuman atau perintah, yang dicatat atau diluluskan dan berhubung dengan ketetapan mana-mana prosiding mahkamah bawahan yang sedemikian. Namun demikian, kuasa penyemakan di bawah s 325 Kanun Acara Jenayah (NMB Bab 6) ('KAJ') adalah secara menyeluruh bersifat budi bicara (lihat ms 723H–I dan 724B–C, E–F); *Emperor v Nasrullah & Ors* AIR 1928 All 287 dan *Liaw Kwai Wah & Anor v PP* [1987] 2 MLJ 69 diikut.

(2) Adalah mandatori di bawah s 173(a) KAJ bahawa pertuduhan seharusnya dibaca dan diterangkan kepada tertuduh sebelum tertuduh ditanya sama ada ia mengaku salah akan kesalahan yang dipertuduhkan atau menuntut dibicarakan. Seseorang tertuduh seharusnya juga mengaku salah atau menuntut perbicaraan dengan melafazkannya dan bukannya melalui peguamnya. Di sini, hakim mahkamah sesyen telah mematuhi sepenuhnya kehendak s 173(a) dan (b) KAJ. Tuduhan itu telah dibaca dan diterangkan kepada tertuduh dan tertuduh memahami sifat dan akibat akuannya (lihat ms 726H dan 727C–D, G).

(3) Mahkamah tidak seharusnya menggunakan afidavit dalam prosiding penyemakan. Nota-nota keterangan seharusnya memuaskan bagi seseorang hakim untuk memutuskan nasib tertuduh. Namun demikian, s 424(1) KAJ menggubal bahawa sebarang afidavit boleh digunakan dalam mahkamah jenayah. Mahkamah ini yang bertindak dalam keupayaan penyemakan adalah juga sebuah mahkamah jenayah. Selanjutnya, afidavit-afidavit dalam kes ini telah dijamin oleh orang yang berkenaan sebagai betul dalam konteks s 424 KAJ (lihat ms 727H–I dan 728G); *PP v Audrey Keong Mei Cheng* [1997] 3 MLJ 477diikut.]

Notes

For cases on plea of guilty, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1737–1826.

For cases on revisionary power of High Court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2145–2150.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (refd)
Emperor v Mangal ILR 36 All 13 (refd)
Emperor v Nasrullah & Ors AIR 1928 All 287 (folld)
Hari Ram Seghal v PP [1981] 1 MLJ 165 (refd)
Heng Kim Khoon v PP [1972] 1 MLJ 30 (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69 (folld)
PP v Audrey Keong Mei Cheng [1997] 3 MLJ 477 (folld)
PP v Tengku Hitam [1962] MLJ 414 (refd)
Queen Empress v Mukundi Lal ILR 21 All 189 (refd)
R v Tan Thian Chai [1932] MLJ 74 (refd)
Rooke's Case (1598) 5 Co Rep 996 (refd)
Soo Leot, Re [1956] MLJ 54 (refd)
Srimati Sailabala Devi v Emperor (1933) 34 Cr LJ 1115 (refd)
Susannah Sharp v Wakefield & Ors [1891] AC 173 (refd)
Wilson v Rastall (1792) 4 Term Rep 753 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 2(1), 173(a), (b), 316(b), 325, 424(1)
Firearms (Increased Penalties) Act 1971 ss 2(1), 4

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the accused.
Amelia Tee Hong Geok (Senior Deputy Public Prosecutor) for the public prosecutor.

Abdul Malik Ishak J: This was a revision at the behest of Messrs Teh Poh Teik & Co for Ku Izham bin Ku Adnan ('the accused') and it was alleged that the accused was not aware of the nature and consequences of his plea as he was unrepresented at the material time. The object of a revision was lucidly set out in the case of *Emperor v Nasrullah & Ors* AIR 1928 All 287 in these words:

> ... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.

The (then) Supreme Court in *Liaw Kwai Wah & Anor v PP* [1987] 2 MLJ 69 comprising of Abdul Hamid CJ (Malaya), Seah and Syed Agil

Barakbah SCJJ spoke of the judge's duty in a revision. His Lordship Abdul Hamid CJ (Malaya) (who later rose to be the Lord President of the Supreme Court), writing for the Supreme Court in typical style, said at p 70 of the report:

> Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court.
>
> The judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

In equally apt terms, Wan Yahya J (who retired as FCJ) said in *Hari Ram Seghal v PP* [1981] 1 MLJ 165 at p 168:

> The court must resist the temptation and decline any invitation into playing the romantic role of the avenger and must concentrate itself instead on procuring justice and upholding the rule of law through our recognized machinery of justice. The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved in their favour.

It must not be forgotten that the powers of revision under s 325 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') are entirely discretionary. This was re-stated in no uncertain terms by his Lordship Abdul Hamid CJ (Malaya) in *Liaw Kwai Wah & Anor v PP* at p 70 of the report in these words:

> The High Court's power sitting in revision is discretionary. As it is, it must therefore be exercised judicially and within the limits and in the spirit of the legislation.

The word 'discretion' has been defined in innumerable ways. The *Rooke's Case* (1598) 5 Co Rep 996 defined discretion as 'something is to be done according to the rules of reason and justice, not according to private opinion'. And 'it is to be, not arbitrary, vague, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself' (*Wilson v Rastall* (1792) 4 Term Rep 753 at p 757 and *Susannah Sharp v Wakefield & Ors* (1891) AC 173 per Lord Halsbury LC at p 179)'. Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 particularly at p 229 tersely remarked:

> ... It is true that the discretion must be exercised reasonably.

Buhagiar J in *Re Soo Leot* [1956] MLJ 54 observed (at p 55):

> No local authorities were quoted and I am not aware that in practice the courts of this country have laid down any rules which confine the discretion given by law in a manner in which the legislature has not seen fit to confine it.

Sulaiman CJ said in *Srimati Sailabala Devi v Emperor* (1933) 34 Cr LJ 1115 at p 1117:

> As interference in a criminal revision is discretionary, the High Court is not absolutely bound even to hear the accused or complainant much less his counsel. But it has always been the invariable practice in all courts to hear them and their counsel, if ready.

Putting these authorities to the forefront of my mind, I will now examine the factual background of the present revision as they appeared in cold print in the notes of evidence. The accused was charged with three others who were still at large for committing robbery of cash amounting to RM103,970 belonging to Khairul Anuar bin Abdul Latiff ('the victim') at the victim's office located at the Caltex petrol station at Jalan Tun Abdul Razak, Johor Bahru, in the district of Johor Bahru, on 25 September 1995 between 1.45am to 2.30am and at the time of the commission of the said robbery, the accused exhibited a firearm, to wit a .38 Smith & Wesson revolver. That charge was under s 4 of the Firearms (Increased Penalties) Act 1971 ('the FIPA') which carried a sentence of imprisonment for life and whipping with not less than six strokes. Section 2(1) of the FIPA defined imprisonment for life to mean 'imprisonment for the duration of the natural life of the person sentenced'. When the accused was produced before the learned sessions judge of the sessions court in Johor Bahru on 12 March 1997, the charge was read and explained to him and he understood that charge. Accordingly, the learned sessions judge recorded in her notes of evidence that the accused had pleaded guilty and understood the nature and consequences of his plea. The learned sessions judge then adjourned the case for a while. This can easily be seen in the notes of evidence. Datin Amelia Tee Hong Geok, the learned senior deputy public prosecutor, rightly pointed out that the adjournment was necessary as the guilty plea of the accused caught every one by surprise. Indeed, this must be the reasonable inference that can be deduced as the charge under s 4 of the FIPA carries with it a heavy sentence as explained earlier. When the sessions court resumed once again on the same day, the learned sessions court judge caused the same charge to be read and explained to the accused. The notes of evidence showed that this rigmarole was dutifully followed. The accused understood that charge and the learned sessions court judge recorded in her notes of evidence that the accused pleaded guilty to the charge and understood the nature and consequences of his plea. The facts of the charge — to be precise the facts of the case — were read to the accused and he admitted it to be so. That marked the final chapter to his life. The learned sessions court judge convicted the accused and sentenced him to life imprisonment and 10 strokes of the rattan.

Within a short compass, the facts of the case may be stated thus. The accused and his three accomplices confronted the victim in front of the victim's house at No 32, Jalan Padi Malinja 11, Bandar Baru Uda, Tampoi, Johor Bahru. The accused and his three accomplices introduced themselves as police officers and directed the victim to accompany them to the central police station as the victim's motorcar JCR 9977 was suspected to be a stolen vehicle. The victim was forced to sit at the rear portion of his own vehicle (JCR 9977) and together with the accused and the three accomplices,

the motorcar proceeded in the direction of the central police station. The motorcar was driven by one of the accomplices. The accused was seated at the rear portion of the vehicle with the victim and as the vehicle proceeded nearer to the central police station, the accused, all of a sudden, pointed a revolver at the victim's body and pressed the victim's head to the floor board of the vehicle. The accused too behaved aggressively and using the butt of the revolver hit the victim's neck three times forcibly. The motorcar then proceeded to the victim's Caltex petrol station at Jalan Tun Abdul Razak. Upon arrival, the accused forced the victim to enter the victim's office at that petrol station and at gun point forced the victim to open the office safe. The victim was naturally frightened and he obeyed the accused. From the office safe, the accused seized RM103,970. The victim was left unharmed. Before leaving the scene, the accused had the audacity to tell the victim that he was an ex-policeman and even showed the victim his previous warrant card. Later, the victim lodged a police report which eventually led to the arrest of the accused.

In this revision, it must be emphasized that the accused had pleaded guilty before the learned sessions court judge for an offence under s 4 of the FIPA. The only serious complaint was that the accused, who was unrepresented, did not understand the nature and consequences of his plea. The accused addressed the court and he impressed upon the court that he has had 19 years' experience in the police force. Section 173(a) of the CPC enacts as follows:

> The following procedure shall be observed by magistrates in summary trials:
>
> (a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.

and it must of necessity apply to the learned sessions court judge. Knox J in *Queen Empress v Mukundi Lal* ILR 21 All 189 at p 190 said:

> The responsibility thrown on magistrates entrusted with summary powers is very great, and the responsibility of those who have to entrust them with such powers is equally great. Magistrates who are sufficiently alive to the responsibility entrusted to them will take care that the procedure and the record is not made more summary than the law has laid down.

The learned sessions court judge was very careful when she handled the guilty plea of the accused. The notes of evidence indicated that she had complied fully with s 173(a) of the CPC. She too dutifully performed her judicial duty under s 173(b) of the CPC which enacts as follows:

> The following procedure shall be observed by magistrates in summary trials:
>
> (b) If the accused pleads guilty to a charge whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon and the Court shall pass sentence according to law:
>
> Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

A In *PP v Tengku Hitam* [1962] MLJ 414 at p 415, Hashim J observed lucidly:

> I invite the attention of all presidents [now re-named and re-styled as sessions court judges] and magistrates to the provisions of s 173(b) of the Criminal Procedure Code.

B The importance of a plea of guilty was emphasized by Sharma J in *Heng Kim Khoon v PP* [1972] 1 MLJ 30 in these words (at p 31):

> A plea of guilty only amounts to an admission that the accused committed the acts alleged against him and not an admission of the guilt under a particular section of the Act.

C It goes without saying that an accused person should plead guilty or claim trial by his own mouth and not through his counsel or advocate: *R v Tan Thian Chai* [1932] MLJ 74. It is mandatory under s 173(a) of the CPC that the charge should be read and explained to the accused before the accused is asked whether he pleads guilty of the offence charged or claims D to be tried.

The present accused appealed against the sentence imposed on him and that appeal was dated 12 March 1997. The appeal merely focussed itself on the 10 strokes of the rattan that the learned sessions court judge imposed on him leaving intact the sentence of life imprisonment. In its E original text, the notice of appeal of the accused bore the following words:

> Merayu hukuman rotan diketepikan dan hukuman penjara dikekalkan.

It appeared that the accused was swayed by two letters from the Johor Bahru prisons dated 15 March 1997 and 25 March 1997. These two letters gave the impression that the accused would be released from prison F on 20 July 2010. This prompted the accused to withdraw his appeal by letter addressed to the deputy registrar of the Johor Bahru High Court. That letter was dated 25 March 1997. The makers of the two letters from the Johor Bahru prisons were obviously mistaken and they have since affirmed affidavits to that effect. Even the Malay lady interpreter that G interpreted for the accused on 12 March 1997 had affirmed an affidavit and in it she clearly and categorically showed that the accused was able to understand the nature and consequences of his plea. But the Court of Appeal in *PP v Audrey Keong Mei Cheng* [1997] 3 MLJ 477 by way of an obiter dicta frowned against the use of affidavits in revision proceedings. I am bound by that decision. Merely relying on the notes of evidence would H be sufficient for me to decide the fate of the accused in this revision. The affidavits of the personalities I mentioned earlier merely confirmed what the learned sessions court judge did and without them, the case against the accused, as far as the procedure was concerned, was still water tight.

It is interesting to note that s 424(1) of the CPC enacts that any I affidavit may be used in a criminal court. This court acting in its revisionary capacity is also a criminal court. Section 2(1) of the CPC defines 'Court' to mean 'the High Court, a Sessions Court, or the Court of a Magistrate of any class, as the context may require'. The full text of s 424 of the CPC reads as follows:

(1) Subject to any rules of Court, any affidavit may be used in a criminal Court if it is sworn —

(a) in the Federation before any Magistrate or Registrar;

(b) in the Republic of Singapore before any Judge, District Judge, Assistant District Judge, Registrar, Deputy Registrar, Police Magistrate or before any person authorised to take affidavits by any written law in force in the Republic of Singapore;

(c) in England, Scotland, Ireland or the Channel Islands or in any Colony, island or place (other than the above) under the dominion or jurisdiction or protection of Her Britannic Majesty, before any Judge, Court, Notary Public or other person lawfully authorised to administer oaths;

(d) in any other place before any officer exercising consular functions on behalf of the Federation.

(2) The Court shall take judicial notice of the seal or signature (as the case may be) of any Judge, Court, Notary Public, Consul, Vice-Consul or other person appended or subscribed to any affidavit.

It appears that the value of affidavit evidence is enshrined in s 424(1) of the CPC and may be used in a criminal court. Knox J in *Emperor v Mangal* ILR 36 All 13 observed in lucid terms:

> I am afraid, however, that it may be the case that the care and precision with which affidavits are intended to be verified and sworn to by the persons who make them are not always observed by those who administer affidavits and those who prepare them. The intention of the law is, and it cannot be too often repeated, that an affidavit must contain nothing but bare facts known to the person who makes the affidavit either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed. Further, as it is for human beings to make a mistake in reciting a fact, the law requires that the contents of affidavits should be carefully read over to the deponents in words understood by them and vouched by them to be correct.

The affidavits of the three personalities referred to earlier must have been vouched by them to be correct in the context of s 424 of the CPC and I have no hesitation to so hold accordingly.

Be that as it may, I do not propose to alter the finding of guilt as found by the learned sessions court judge (see s 316(b) of the CPC) and after hearing the submissions of Mr Hisham Teh Poh Teik, learned counsel for the accused, I was inclined to merely reduce the number of strokes of whipping as imposed by the learned sessions court judge from 10 to the minimum of six. I confirmed the sentence of imprisonment for life meaning imprisonment for the duration of the natural life of the accused and reduced the whipping of 10 strokes to that of six strokes of the rattan. The prerogative of a pardon and the only avenue left for the accused to hope and pray for would be the Pardons Board. That must surely be the next course of action for the accused to undertake.

Sentence of life imprisonment confirmed but the number of strokes of whipping reduced from 10 to six.

Reported by Zahid Taib